FILED
SEP 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-262

In The

# Supreme Court of the United States

October Term, 1990

SHEILA SIMS,

*Petitioner,*

v.

JOHN MULCAHY,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRADLEY D. ARMSTRONG
AXLEY BRYNELSON
2 East Mifflin Street
Post Office Box 1767
Madison, WI 53701-1767
(608) 257-5661

*Counsel of Record*
*for Respondent.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

## QUESTION PRESENTED

I. WHETHER THE PETITIONER WAIVED, PURSUANT TO RULE 51, FEDERAL RULES OF CIVIL PROCEDURE, CONSIDERATION ON APPEAL OF THE JURY'S REFUSAL TO AWARD NOMINAL DAMAGES, BY FAILING TO REQUEST ANY JURY INSTRUCTION RELATING TO NOMINAL DAMAGES, BY AGREEING WITH THE DISTRICT COURT'S JURY INSTRUCTION RELATING TO NOMINAL DAMAGES, BY FAILING TO OBJECT AT TWO SEPARATE JURY INSTRUCTION CONFERENCES TO THE DISTRICT COURT'S PROPOSED NOMINAL DAMAGES JURY INSTRUCTION AND BY REQUESTING JURY INSTRUCTIONS ON MATTERS SO UNRELATED TO THE SUBJECT OF NOMINAL DAMAGES THAT THE DISTRICT COURT WAS NOT ON NOTICE THAT THE PETITIONER INTENDED TO CHALLENGE THE NOMINAL DAMAGES JURY INSTRUCTION.

## PARTIES

Respondent agrees with the petitioner's statement of the parties involved in the present Petition for a Writ of Certiorari. The Petition does not list "all parties to the proceeding in the court whose judgment is sought to be reviewed," as required by Supreme Court Rule 14.1(b). Although the petitioner has failed to comply with Supreme Court Rule 12.4 requiring the petitioner to notify the Clerk in writing if one or more of the parties below has no interest in the outcome of the Petition, respondent agrees that, based on the questions presented in the Petition for a Writ of Certiorari, the other appellees below have no interest in the outcome of the Petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

SUMMARY OF ARGUMENT ..... 7

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ..... 8

I. PETITIONER HAS WAIVED APPELLATE CONSIDERATION OF WHETHER SHE IS ENTITLED TO RECOVER NOMINAL DAMAGES WHERE PETITIONER FAILED TO OBJECT TO THE JURY INSTRUCTION RELATING TO NOMINAL DAMAGES AS REQUIRED BY RULE 51 ..... 8

II. THE QUESTIONS PRESENTED IN THE PETITION FOR A WRIT OF CERTIORARI DO NOT ACCURATELY REPRESENT THE QUESTIONS DECIDED BELOW BY THE SEVENTH CIRCUIT COURT OF APPEALS ..... 14

CONCLUSION ..... 17

APPENDIX ..... App. 1

Conference re: Special Verdict and Jury Instructions Concerning Damages ..... App. 1

TABLE OF CONTENTS – Continued

Page

Plaintiff's Requested Special Jury Instructions – Damages .....App. 12

Conference re: Special Verdict and Jury Instructions Concerning Damages – Part 2.....App. 19

# TABLE OF AUTHORITIES

Page

CASES

*Bertrand v. Southern Pacific Co.*, 282 F.2d 569 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961) ..... 15

*Chicago Col. of Ost. Med. v. George A. Fuller Co.*, 719 F.2d 1335 (7th Cir. 1983) ..... 10

*Cohen v. Franchard Corp.*, 478 F.2d 115 (2nd Cir.), *cert. denied*, 414 U.S. 857 (1973) ..... 9

*Coffey v. Van Dorn Iron Works*, 796 F.2d 217 (7th Cir. 1986) ..... 15

*Don Kemper Co. v. Beneficial Standard Life Ins. Co.*, 425 F.2d 221 (3rd Cir. 1970) ..... 9

*Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) ..... 15

*Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S.Ct. 252, 77 L. Ed. 439 (1933) ..... 13

*Feltman v. Norris*, 172 F.2d 289 (D.C. Cir. 1949) ..... 13

*Gentry v. Louisville and Nashville Railroad Co.*, 371 F.2d 829 (6th Cir. 1967) ..... 9

*Hardware Mut. Ins. Co. v. Lukken*, 372 F.2d 8 (10th Cir. 1967) ..... 9

*Hernandez v. Hill Country Telephone Co-op, Inc.*, 849 F.2d 139 (5th Cir. 1988) ..... 15

*Investment Service Co. v. Allied Equities Corp.*, 519 F.2d 508 (9th Cir. 1975) ..... 9

*Jack v. Craighead Rice Milling Co.*, 167 F.2d 96 (8th Cir.), *cert. denied*, 334 U.S. 829 (1948) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953) ..... 12

*Krug v. Mutual Ben. Health & Accident Assn.*, 120 F.2d 296 (8th Cir. 1941) ..... 10

*Lee v. Terminal Transport Co.*, 269 F.2d 97 (7th Cir. 1959) ..... 9

*Mill Owners Mut. Fire Ins. Co. v. Kelly*, 141 F.2d 763 (8th Cir. 1944) ..... 9

*O'Connell v. Naess*, 176 F.2d 138 (2nd Cir. 1949) ..... 12

*Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 2d 645 (1943) ..... 10

*Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988) ..... 13

*Ries v. Lynskey*, 452 F.2d 172 (7th Cir. 1971) ..... 9

*Schultz v. Rice*, 809 F.2d 643 (10th Cir. 1986) ..... 15

*Sims v. Mulcahy*, 902 F.2d 524 (7th Cir. 1990) ..... 16

*Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L. Ed. 2d 293 (1987) ..... 8

*Tropea v. Shell Oil Co.*, 307 F.2d 757 (2nd Cir. 1962) ..... 10

*Walker v. Action Industries, Inc.*, 802 F.2d 703 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) ..... 9

*Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985) ..... 13

*Wilson v. O'Leary*, 895 F.2d 378 (7th Cir. 1990) ..... 15

*Worden v. Courtemanche*, 415 F.2d 349 (2nd Cir. 1969) ..... 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS/STATUTES/RULES

U.S. Const. amend. IV ..... 3

42 U.S.C. Section 1983 ..... 14

Fed. R. Civ. P. 46 ..... 2, 7, 8, 15

Fed. R. Civ. P. 49(a) ..... 14

Fed. R. Civ. P. 51 ..... *passim*

Sup. Ct. R. 12.4 ..... ii

Sup. Ct. R. 14.1(b) ..... ii

OTHER AUTHORITIES

Annotation, *Construction and Application of Provision of Rule 51 of Federal Rules of Civil Procedure Requiring Party Objecting to Instructions or Failure to Give Instructions to Jury, to State "Distinctly the Matter to Which He Objects and the Grounds for Objections"*, 35 A.L.R. Fed. 727 (1977) ..... 9

9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2551 (1971) ..... 9

No. 90-262

In The

# Supreme Court of the United States

October Term, 1990

SHEILA SIMS,

*Petitioner,*

v.

JOHN MULCAHY,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## OPINIONS BELOW

Respondent is satisfied with the petitioner's statement of the opinions below.

## JURISDICTION

Respondent is satisfied with the petitioner's statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked.

## STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition for a Writ of Certiorari, the following provisions are also involved in the questions presented:

**Rule 46. Exceptions Unnecessary**

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Fed. R. Civ. p. 46

**Rule 51. Instructions to Jury: Objection**

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. p. 51

## STATEMENT OF THE CASE

The petitioner commenced an action against the City of Mad son, Wisconsin, and several of its police officials, including respondent, alleging that she was discriminated against on the basis of her race, that her Fourth Amendment rights had been violated and that the defendants' actions gave rise to a number of state law causes of action. The district court granted, in part, the defendants' motion for summary judgment and dismissed all of the plaintiff's state law claims and plaintiff's federal civil rights claims against all defendants with the exception of the respondent, City of Madison Police Officer John Mulcahy.

A bifurcated jury trial commenced on January 3, 1989. Following a two-day trial on the issue of liability, the jury found that the respondent's entry into the petitioner's apartment violated the petitioner's Fourth Amendment rights. The jury further found that the respondent's entry into the petitioner's apartment did not constitute differential treatment of petitioner based on her race. (Petitioner's Appendix, p. 51.)

The damages portion of the trial commenced on January 6, 1989. Immediately prior to the start of the damages trial, the district court held a conference with counsel for the parties concerning the special verdict and jury instructions relating to the issue of damages. (The January 6, 1989 pretrial special verdict and jury instruction conference transcript is reproduced in its entirety in Respondent's Appendix, pp. 1-11.) Counsel for the plaintiff was present at and participated in the special verdict

and jury instruction conference. The district court distributed a proposed special verdict and proposed jury instructions to the parties, and asked the attorneys for the parties for objections to the proposed instructions. Counsel for the petitioner expressed the following concerns relating to the district court's proposed jury instructions: (1) that the jury be alerted that evidence presented during the liability portion of the trial could be considered by the jury in its consideration of the damages verdict; and (2) that the court include an instruction on community humiliation and loss of reputation. (Res. App., pp. 4-5.) Petitioner expressed no other objection to the district court's proposed jury instructions.

The district court distributed at the special verdict and jury instruction conference a proposed instruction relating to compensatory and nominal damages which provided as follows:

> DAMAGES – COMPENSATORY AND NOMINAL
>
> The special verdict form that you will receive before you begin your deliberations inquires about damages.
>
> You should determine what sum of money will fully compensate the plaintiff for any pain, suffering and mental anguish that was proximately caused by the defendant's violation of the plaintiff's rights. These damages are known as "compensatory damages." You are not permitted to award speculative damages. Do not include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.
>
> Even if you find plaintiff is entitled to no compensatory damages, however, you may still

> award plaintiff nominal damages of up to one dollar for the violation of her constitutional right by any individual defendant.

(Pet. App., p. 56.) The petitioner did not object to this proposed instruction. Significantly, the jury instructions proposed by the petitioner contained no provision relating to an award of nominal damages. (Petitioner's proposed jury instructions are reproduced in Respondent's Appendix, pp. 12-18.)

The nominal damages jury instruction was specifically addressed by the court and counsel during the instruction conference. Counsel for petitioner stated, *"As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there is inconsistent with the law."* (Res. App., p. 10.) The Petition for a Writ of Certiorari neglects to inform the Court of the petitioner's express agreement to the district court's proposed nominal damages instruction during the instruction conference. At the conclusion of the special verdict and jury instruction conference, petitioner was given the opportunity, but expressly declined, to assert any further objections to the district court's proposed jury instructions. (Res. App., p. 11.)

Following a half-day trial on damages, the district court held a second conference on jury instructions relating to the issue of damages. (A complete transcript of the January 6, 1989 post-trial special verdict and jury instructions conference is reproduced at pp. 19-25 of Respondent's Appendix.) The issue of the nominal damages jury instruction was again addressed by the district court at this conference. Petitioner made no request at this time for a jury instruction providing that nominal damages

must be awarded upon the finding of a constitutional violation. Moreover, the petitioner raised no objection at the second jury instruction conference to the district court's proposed nominal damages instruction, although again given an opportunity to do so. (Res. App., p. 24.)

During the jury's deliberations on the issue of damages, the jury asked the following question: "On question #1, is there a *required minimum amount*?" (Pet. App., p. 54.) The district court held a bench conference regarding the jury question and the district court judge asked the parties whether "there [was] any objection to the court answering no and returning it to jurors." (Pet. App., p. 54.) Counsel for petitioner did not object to this response, but stated, "I would prefer that the jury instruction that included the compensatory/nominal instruction be sent with the answer no." (Pet. App., p. 54.) The district court declined to include the jury instruction. The jury found that the petitioner was entitled to no damages and the district court consequently dismissed the petitioner's action.

The trial court denied the petitioner's post-verdict motions to amend the verdict to add one dollar and for a new trial on damages, finding that the plaintiff had waived this matter by failing to object to the jury instruction relating to nominal damages. On appeal, the Seventh Circuit Court of Appeals affirmed the district court's denial of the petitioner's motions to amend the verdict and for a new trial. The Seventh Circuit Court of Appeals found that the petitioner's failure to object to the nominal damages instruction, as required by Rule 51, Federal Rules of Civil Procedure, constituted a waiver of this issue on appeal.

## SUMMARY OF ARGUMENT

The petitioner waived her right to appellate consideration of whether she is entitled to recover nominal damages. The petitioner did not object to the nominal damages instruction proposed by the district court. The petitioner expressly agreed with the district court's proposed nominal damages jury instruction. The petitioner requested no instruction of her own on the issue of nominal damages, and any objections by the petitioner to jury instructions relating to damages were not sufficiently specific to comply with Rule 51, Federal Rules of Civil Procedure. Moreover, the petitioner agreed with the district court's answer to a jury question during deliberations that the jury was not required to award a minimum amount of damages.

The Questions Presented in the Petition for a Writ of Certiorari do not accurately reflect the holdings of the court below. The Court of Appeals for the Seventh Circuit did not decide the issue of whether nominal damages must be awarded upon the finding of a constitutional violation because the Court of Appeals found that the petitioner had waived consideration of this issue by failing to object to the applicable jury instruction. Similarly, the Court of Appeals did not consider whether petitioner was entitled to a new trial based on allegedly inconsistent verdicts because the court found that the petitioner had waived any challenge to the damages verdict by petitioner's failure to object to the district court's proposed jury instructions. Moreover, petitioner waived consideration of this issue by the court of appeals by not raising this issue until her reply brief. Finally, the Seventh Circuit Court of Appeals did not find that Rules 46 and 51,

Federal Rules of Civil Procedure, should not be read conjunctively in determining whether a party has waived a challenge to a jury instruction, as petitioner asserts in her Petition. This issue was neither raised nor considered by the Seventh Circuit Court of Appeals. However, even had petitioner raised this issue, it would be meritless where petitioner failed to object with the degree of specificity required by Rule 46.

## ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### I. PETITIONER HAS WAIVED APPELLATE CONSIDERATION OF WHETHER SHE IS ENTITLED TO RECOVER NOMINAL DAMAGES WHERE PETITIONER FAILED TO OBJECT TO THE JURY INSTRUCTION RELATING TO NOMINAL DAMAGES AS REQUIRED BY RULE 51.

Rule 51, Federal Rules of Civil Procedure, in relevant part, provides:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed. R. Civ. P. 51. The United States Supreme Court generally will not consider an issue where the petitioner fails to object to the applicable jury instruction. *Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L. Ed. 2d 293 (1987). The well-recognized purpose of Rule 51's requirement that a party object to the district court's giving or failure to give an instruction, and specify the exact nature of the objection, as well as the grounds of the objection, is

to insure that the trial judge will become aware of the claimed error and will have an opportunity to correct it at trial. *Cohen v. Franchard Corp.*, 478 F.2d 115, 122 (2nd Cir.), *cert. denied*, 414 U.S. 857 (1973); *Don Kemper Co. v. Beneficial Standard Life Ins. Co.*, 425 F.2d 221, 222 (3rd Cir. 1970); *Ries v. Lynskey*, 452 F.2d 172, 174 (7th Cir. 1971); *Investment Service Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975); *Hardware Mut. Ins. Co. v. Lukken*, 372 F.2d 8, 13 (10th Cir. 1967); Annotation, *Construction and Application of Provision of Rule 51 of Federal Rules of Civil Procedure Requiring Party Objecting to Instructions or Failure to Give Instructions to Jury, to State "Distinctly the Matter to Which He Objects and the Grounds for Objections"*, 35 A.L.R. Fed. 727 (1977).

Rule 51 also serves the purposes of both lessening the burden on appellate courts by decreasing the number of trial court rulings they may be called upon to review, and of avoiding the necessity of a new trial where a party, either by design or sheer neglect, fails to object to a proposed jury instruction. 9 C. Wright and A. Miller, *Federal Practice and Procedure*, §2551 (1971).

Federal Courts of Appeals have refused to review an alleged error in jury instructions where the complaining party did not request an instruction on the particular matter. *Walker v. Action Industries, Inc.*, 802 F.2d 703 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Worden v. Courtemanche*, 415 F.2d 349 (2nd Cir. 1969); *Gentry v. Louisville and Nashville Railroad Co.*, 371 F.2d 829 (6th Cir. 1967); *Lee v. Terminal Transport Co.*, 269 F.2d 97, 99 (7th Cir. 1959); *Mill Owners Mut. Fire Ins. Co. v. Kelly*, 141 F.2d 763, 766 (8th Cir. 1944).

In the present case, the petitioner submitted proposed jury instructions to the trial court on the question of damages, but said instructions included no provision whatsoever relating to nominal damages. During the two court hearings on the subject of jury instructions, the petitioner at no time orally requested a jury instruction relating to nominal damages. Moreover, the petitioner expressly concurred that the district court's proposed jury instruction relating to nominal damages accurately stated the law. Petitioner may not complain on appeal that the district court failed to properly instruct the jury on the issue of nominal damages where petitioner neither submitted nor requested an instruction relating to nominal damages.

It is settled law that an "objection to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L. Ed. 2d 645 (1943). Rule 51 expressly requires that a party state "distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. The Courts of Appeals decisions are uniform that a party's failure to object to an instruction with particularity defeats the purpose of Rule 51 in that the district court does not have an opportunity to correct the alleged erroneous instruction and, thus, constitutes a waiver of consideration of the matter on appeal. *Chicago Col. of Ost. Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1349 (7th Cir. 1983); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 769 (2nd Cir. 1962); *Jack v. Craighead Rice Milling Co.*, 167 F.2d 96, 103 (8th Cir.), *cert. denied*, 334 U.S. 829 (1948); *Krug v. Mutual Ben. Health & Accident Assn.*, 120 F.2d 296, 301 (8th Cir. 1941).

Petitioner at no time objected to the district court's proposed jury instruction on nominal damages with the required specificity to put the district court on notice that the petitioner was alleging error with regard to said instruction. At the first instruction conference, the petitioner requested an instruction to the effect that the jury could consider testimony from the liability portion of the trial when deliberating on the damages verdict and an instruction on loss of reputation and community humiliation. These requested instructions were wholly unrelated to the petitioner's assertion in her Petition that the district court should have instructed the jury that it must award nominal damages upon a finding of a constitutional violation. Petitioner's requested instructions were not adequately specific to allow the district court to "focus [on] the precise nature of the alleged error."

Petitioner did not simply fail to object to the proposed instruction on nominal damages; petitioner expressly stated that she believed the district court's proposed nominal damages instruction was in accord with the law in this area during a discussion specifically addressing the nominal damages jury instruction. ("As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there [the court's proposed instruction] is inconsistent with the law.") (Res. App., p. 10.)

Petitioner's statement that she was uncomfortable with the court's proposed special verdict question on damages similarly lacks the requisite specificity to constitute a proper objection under Rule 51. Plaintiff's objection to the special verdict question asserted that a single question regarding compensatory damages may "short

change" the petitioner and may make it difficult for the jury to deliberate regarding "exactly what it is they should be compensating for." (Pet. App., p. 55.) This statement makes clear that petitioner's sole concern was with the issue of *compensatory* damages. This objection cannot reasonably be deemed to alert the district court that the petitioner was objecting to the nominal damages jury instruction.

Petitioner asserts that her response to the following question by the jurors during their deliberations further illustrates her objection to the district court's instruction on nominal damages: "On Question #1, is there a *required minimum amount*?". (Pet. App., p. 54.) The district court proposed the answer "no" to this question and the petitioner agreed with said answer, stating, "I would prefer that the jury instruction that included the compensatory/ nominal instruction be sent with the answer no." (Pet. App., p. 54.) The requested instruction, however, simply *allowed* the jury to award nominal damages, but did not require such an award. ("Even if you find plaintiff is entitled to no compensatory damages, however, you *may* still award plaintiff nominal damages of up to one dollar for the violation of her constitutional right by any individual defendant.") (Pet. App., p. 56.) Plaintiff's request that this instruction be sent to the jury could not reasonably have alerted the district court that the petitioner was asserting that an award of nominal damages was mandatory. Moreover, Rule 51 and case law thereunder provides that an objection made after the jury begins its deliberations is untimely and will not be considered on appeal. *Kanatser v. Chrysler Corp.*, 199 F.2d 610, 620 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *O'Connell v. Naess*,

176 F.2d 138, 140 (2nd Cir. 1949); *Feltman v. Norris*, 172 F.2d 289 (D.C. Cir. 1949). (See also, *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 486, 53 S.Ct. 252, 77 L. Ed. 439 (1933), stating the common-law rule that objections made to jury instructions after the jury has retired to begin its deliberations are untimely and do not furnish a basis for review.)

Petitioner's contention that she cannot waive a legal question must be rejected. Where the petitioner agreed that the district court's nominal damages instruction accurately stated the law in this area, said instruction became the "law of the case" which petitioner is precluded from challenging on appeal. *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988) (en banc). *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

This Court should deny the Petition for a Writ of Certiorari because the law is well-settled that failure by a party to timely object to a proposed jury instruction with specificity waives consideration of the matter involved in said instruction by an appellate court. Here, petitioner proposed no jury instruction of her own regarding nominal damages. Additionally, petitioner expressly approved the jury instruction relating to nominal damages which was proposed by the district court. Finally, any objections by the petitioner to the district court's proposed jury instructions were not sufficiently specific to alert the district court that petitioner objected to the nominal damages instruction. The district court and the Seventh Circuit Court of Appeals both correctly found that the petitioner waived her right, pursuant to Rule 51, to challenge the jury's refusal to award nominal damages.

## II. THE QUESTIONS PRESENTED IN THE PETITION FOR REVIEW DO NOT ACCURATELY REPRESENT THE QUESTIONS DECIDED BELOW BY THE SEVENTH CIRCUIT COURT OF APPEALS.

The petitioner asserts that there is a split in the Federal Courts of Appeals on the issue of "whether nominal damages should be awarded as a matter of law when the jury in a bifurcated trial has found that there has been a constitutional deprivation under 42 U.S.C. Section 1983." (Petition for a Writ of Certiorari, p. i.) Petitioner is mistaken in her assertion that the Seventh Circuit Court of Appeals held that a jury is not required to award nominal damages upon the finding of a constitutional violation. The Seventh Circuit, in its decision below, never decided this issue because it found that the petitioner, by expressly agreeing to the proposed nominal damages jury instruction and failing to timely and adequately object to said instruction, as required by Rule 51, Federal Rules of Civil Procedure, had waived consideration of this issue on appeal. The Supreme Court should not utilize its limited time and resources to review an issue which the court below did not decide and which most of the Federal Courts of Appeals, to date, have not addressed.

Petitioner, in her Second Question Presented asserts that the Federal Courts of Appeals are in disagreement on the issue of whether Rule 49(a), Federal Rules of Civil Procedure, "requires that a party's motion for a new trial on damages be granted when there are inconsistent answers to special verdict interrogatories." (Petition for a Writ of Certiorari, p. i.) Significantly, petitioner did not raise before the Seventh Circuit Court of Appeals the question of her entitlement to a new trial due to allegedly

inconsistent verdicts until her reply brief. (Reply Brief of Plaintiff-Appellant and Answering Brief of Cross-Appellee, Section II.D.) It is well-settled law that issues which are raised for the first time in a reply brief are deemed waived. *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990); *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291, 1293 (7th Cir. 1987); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986).

Finally, petitioner asserts that there is a split in the Federal Courts of Appeals on the issue of "whether courts are required to consider Rules 46 and 51 to be read conjunctively when determining that a party has waived any rights for a new trial." (Petition for a Writ of Certiorari, p. i.) Petitioner did not assert in either the district court or the Court of Appeals below that the courts must read Rules 46 and 51 conjunctively in determining whether the petitioner waived consideration of her entitlement to nominal damages. Consequently, this issue was not preserved for appellate review in the Supreme Court.

Assuming *arguendo* that Rules 46 and 51, Federal Rules of Civil Procedure, must be read conjunctively, Rule 46, like Rule 51, requires that a party state, with specificity, his or her objection to the court's ruling and the grounds for the objection. *Hernandez v. Hill Country Telephone Co-op, Inc.*, 849 F.2d 139, 142 (5th Cir. 1988); *Schultz v. Rice*, 809 F.2d 643, 646-47, n. 5 (10th Cir. 1986); *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961). ("Reading together Rules 46 and 51 as appellant asks us to do, it may be concluded that objections to the giving or the failure to give instructions need not follow any particular form.

*Rule 46, however, does not undermine the provision of Rule 51 that whatever the form of the objection it must at least state distinctly the matter to which objection is taken and the grounds for the objection.*") (Emphasis added) As discussed above, the petitioner failed to specify any objection to the district court's nominal damages instruction. Rule 46's abolition of the need to make formal exceptions to court rulings provides no relief to the petitioner.

At the close of petitioner's argument to the Third Question Presented, petitioner concedes that the language of the jury instruction relating to nominal damages was legally sufficient. ("There is nothing wrong with that language *per se*.") (Petition, p. 13.) Petitioner then asserts:

> The error of the trial court was as correctly pointed out by petitioner, the lumping together of all of the elements of damages for which petitioner was entitled to be compensated and utilizing the language "amount" and "compensated" for in conjunction with the *single* question that was to include nominal damages.

[Petition, pp. 13-14.] The Seventh Circuit Court of Appeals expressly refused to consider this argument because it had been raised by the petitioner for the first time in her reply brief. *Sims v. Mulcahy*, 902 F.2d 524, 536, n. 5 (7th Cir. 1990). Petitioner may not obtain review of this matter in the United States Supreme Court when she failed to comply with the rules of the Court of Appeals to obtain review of the issue in that court.

## CONCLUSION

The United States Supreme Court should deny the Petition for a Writ of Certiorari because it is settled law that failure to timely and adequately object to a jury instruction constitutes a waiver of consideration of the particular matter on appeal. The Federal Courts of Appeals are in full accord on this matter and the facts of the present case present no novel issue of federal law. Petitioner did not simply fail to object to the district court's nominal damages instruction, she expressly stated to the district court that the court's proposed instruction was consistent with the law. Such conduct clearly establishes a waiver of any objection to the jury instruction on appeal.

Respectfully submitted,

BRADLEY D. ARMSTRONG
*Counsel of Record*
*for Respondent*
AXLEY BRYNELSON
2 East Mifflin Street
Post Office Box 1767
Madison, WI 53701-1767
(608) 257-5661

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

---

| | | |
|---|---|---|
| SHEILA SIMS, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. 88-C- |
| vs. | ) | 524-S |
| | ) | |
| CITY OF MADISON, | ) | Filed Jan 30 |
| Defendant. | ) | 1989 |

CONFERENCE RE: SPECIAL VERDICT AND JURY INSTRUCTIONS
CONCERNING DAMAGES

BEFORE DISTRICT JUDGE JOHN C. SHABAZ

Conference on January 6, 1989

APPEARANCES:

For the Plaintiff: Kathleen Wagner
Wagner Law Offices
222 S. Hamilton, #13
Madison, WI 53703

For the Defendant: Steven J. Schooler
Brad Armstrong
Axley Brynelson
PO Box 1767
Madison, WI 53701

Carroll Metzner
Bell, Metzner & Gierhart
PO box 1807
Madison, WI 53701

Karen Little, Transcriber
Words Unlimited

(p. 2) THE CLERK: All rise. All persons having business before the Honorable Judge John C. Shabaz of

the United States District Court of the Western District of Wisconsin will draw nigh and get their attention. This Honorable Court is now in session. God save the government of the United States and this Honorable Court. Please be seated and come to order.

Case number 88 C 524 S, Sims versus City of Madison, called for a conference. May I have your appearances please?

MS. WAGNER: Yes, Sheila Sims appears by her attorney Kathleen A. Wagner, Wagner Law Offices, S.C.

MR. ARMSTRONG: The defendant John Mulcahy appears by attorney Brad Armstrong, presently Mike Model and Steven Schooler will be here shortly.

THE COURT: The Court has distributed – has caused to have distributed to counsel a proposed special verdict and those jury instructions which are suggested as appropriate in this matter. Ms. Wagner, have you had an opportunity to examine them?

MS. WAGNER: I have had an opportunity to look at the special verdict. I have not had an opportunity to look at the instructions, yet, your Honor.

(p. 3) THE COURT: Alright, why don't we take a few moments, then, to examine the documents so we can have our conference.

[Examining Documents]

THE COURT: Ms. Wagner?

MS. WAGNER: Yes, I've had an opportunity to review them.

THE COURT: Alright, I'll hear your comments concerns relating to the special verdict.

MS. WAGNER: I am uncomfortable with the single question because I think in this case, based on prior case law, there is several types of damages, in addition to the emotional distress and pain and suffering, there is also the community humiliation and loss of reputation and I had included with my proposed instructions information on Crawford versus Kraemer, at 719 Federal Second, 1370, 1983. It's a Wisconsin Jury Instruction that has been modified, number 2516. I think it's important for the jury to have a reasonable understanding of what types of components there are that they may be considering. I think this question tends to just lump it all as one area, and I feel that it may have the impact of short changing. But more critically, also of making it very difficult for them to deliberate it as to exactly what it is that they should be compensating for.

(p. 4) THE COURT: Further?

MS. WAGNER: As it relates to the punitives, it is very brief, but I think it's to the point, and it's acceptable from our perspective, your Honor.

THE COURT: Mr. Armstrong.

MR. ARMSTRONG: I – with respect to question one, I would object and ask that the word damages be deleted and the words suffering and mental anguish be inserted, focusing on what I believe the evidence will show to be the only damages, or type of damages sustained in this case, contrary to the types of damages

suggested in plaintiff's requested special verdict. Secondly, I object to any inclusion of a question regarding punitive damages, for the court has heard, I believe perhaps all evidence relating to the – surrounding the nature of the entry into the apartment. In the case of Smith versus Wade, the law is that the jury can assess punitive damages. In the 1983 action where the defendants conduct is motivated by evil motive or intent in where it involves reckless or callous indifference to the federally protected rights of others.

THE COURT: I'm not interested in the motion for directed verdict on the evidence at this time. We haven't completed the damage portion of the trial. Your arguments may very well be appropriate, but they are premature at this time. The Court at this time is placing before you a (p. 5) special verdict based upon those issues which may be appropriately submitted to the jury. We are looking at the form.

MR. ARMSTRONG: In the event that the Court, over objection, determines that a punitive damage question is appropriate, number two is appropriate.

THE COURT: Alright, we'll then next look at the instructions which the Court has provided out here, those concerns of the plaintiff relating to the instructions. Ms. Wagner?

MS. WAGNER: Yes, your Honor, one of my concerns, and I'm not sure of where the exact location should be in the instructions. Perhaps as we talk about the preponderance of the evidence, is the fact that this is a bifurcated trial, and therefore would like to call the jury's attention to the fact that they don't only consider the

evidence as it is presented today, but also the evidence as it was presented earlier in the week. I consider that particularly significant as it relates to the punitive damages question because I think the fact that there was no attempt to call the supervisor after it had happened, or the identification weeks as to who had entered Ms. Sims' apartment, is the type of information that the jury needs to deliberate with in answering question number (p. 6) two, and I would prefer not having to – not present that evidence today and take up the Court's time.

THE COURT: You won't even be allowed to. If you try it, you'll be ruled out of order. So, don't be concerned about that. In fact, maybe that's one way of getting it to the jury. Once you start on that course, the Court will admonish you in front of the jury and advise that the jury does, indeed, consider all of the evidence as presented in both phases of this trial in reaching its verdict on damages. That's understood.

MS. WAGNER: Maybe to us. I'm not sure as to a juror.

THE COURT: Well, tell them then. Tell them in your argument, if you want to. Anything further on the instructions?

MS. WAGNER: No, your Honor. Oh, excuse me, yes there is. There is, as I indicated earlier, my instruction on page 34 that I would like to have included on the community humiliation and loss of reputation because I consider that a significant factor in this particular case as it relates to her damages.

THE COURT: There will also be the final instructions, which you recall, from the first phase of the trial relating to the anonymous verdict, and those other appropriate instructions which are included in your (p. 7) previous package of the last four instructions. The Court uses those last four instructions which may be appropriate. Mr. Armstrong?

MR. ARMSTRONG: Yes, sir, regarding the instructions, we have no objection to the . . .

THE COURT: I want the objections that you may have.

MR. ARMSTRONG: Yes, sir. In regard to approximate cause defined, in more than one approximate cause, we would request that our instruction be given. It is only a deviation from the Court's proposed instruction in that we focus on what I believe the claim damage will be, suffering and mental anguish, and delete the words injury or damage.

THE COURT: Now, let's see if I am tracking you now.

MR. ARMSTRONG: Yes, sir.

THE COURT: You are suggesting that instead of the approximate cause defined, add more than one approximate cause, you have the court insert the deleted instruction which was filed at 8:29 this morning.

MR. ARMSTRONG: No, that's not what I'm asking. I want that . . .

THE COURT: Why don't you speak English and let me know what you are talking about? We got instructions

(p. 8) here. I'll count them for you. Can you count? Alright, then let's proceed to those instructions which you object to.

MR. ARMSTRONG: Approximate cause defined.

THE COURT: Alright. You're objecting to that.

MR. ARMSTRONG: Yes.

THE COURT: And you wish to have instead of that what?

MR. ARMSTRONG: The language that I have requested in my proposed instructions whereby the words injury or damage are deleted, and words suffering or mental anguish are inserted at each place those words appear.

THE COURT: Alright. That's that instruction. That was the same arguments that you made as it related to the special verdict. Next.

MR. ARMSTRONG: More than one approximate cause instruction, I object to that from the same basis. I want the words suffering or mental anguish inserted, and the words injury or damage deleted.

THE COURT: Next.

MR. ARMSTRONG: Instruction entitled damages, compensatory and nominal. I object to the last sentence of the second paragraph which talks about damages reasonably certain to occur to the future. I don't believe there will be any appropriate competent proof, medical and otherwise, (p. 9) to support a claim for any future damages. I object to that same instruction to the last

paragraph. My judgment being that it is contrary to the law and I have requested this morning an instruction regarding damages. I do not believe that jury is entitled to award nominal damages for the violation of the constitutional right in the absence of proof of an actual injury.

THE COURT: And you also believe, if I understand you, the last sentence of the second paragraph of that instruction entitled damages compensatory and nominal which reads do not include in any verdict compensation for any prospective loss which although possible, is not reasonably certain to occur in the future. Is that the sentence you want stricken?

MR. ARMSTRONG: Yes, sir.

THE COURT: Alright. Further.

MR. ARMSTRONG: I object to the instruction entitled damages, pain, mental anguish, past and future. I object to number two within the first paragraph in its entirety in that it refers to damages for future damages for the cause. It is the same objection that we just discuss regarding the last instruction discussed. So, from the semicolon the words and paran two any pain suffering and mental anguish which you find from the evidence in the case that she is reasonably certain to suffer in the future (p. 10) from the same cause, I object to it and ask that it be deleted.

THE COURT: Further

MR. ARMSTRONG: I object to the instruction entitled punitive damages, constitutional violation in its entirety in that I do not believe that the evidence will support the giving of such an instruction. I do not object

to the wording of the instruction, should the Court deem it appropriate to give the instruction.

THE COURT: Further.

MR. ARMSTRONG: I object to the instruction entitled affect of instructions as to damages. I object to the entire last sentence and ask that it be deleted in that I believe it suggests to the jury contrary to this instruction I requested this morning, that in the event of a finding in favor of plaintiff on the question of liability, their entitled and should award damages. I believe that's not the law.

THE COURT: Anything further?

MR. ARMSTRONG: I request that my instruction provided the Court and counsel this morning entitled damages, . . . of actual injury, be given as in its entirety as indicated and as submitted.

(p. 11) THE COURT: You also have heard the requested additional instructions from plaintiff's counsel, your comments relating to that.

MR. ARMSTRONG: Yes. I object to the giving of instruction which she is entitled, number 7, damages, community humiliation, and loss of reputation on the grounds that it is not and will not be consistent with the theory of the case of the proof in the case. The support for the claims are a [phonetic] a Crawford versus Garnier case, which is a termination of employment case. The public employer terminated some employee and in so doing, there was actual proof of words in consistent with the employee's reputation which did not allow him to obtain further employment. In other words, there was actual proof of damaged reputation. That was the theory

of the case. And the Wisconsin Jury Instruction cited as support for giving this instruction is one preceding of the claim for defamation, and this not a case a state claim for defamation and there will not be appropriate evidence regarding reputation in this case, and is not to date.

THE COURT: Your response, Ms. Wagner?

MS. WAGNER: As it relates to the instructions of approximate cause, that is approximate cause defined in the more than one approximate cause, I believe the instructions as given by the Court are the appropriate instructions and (p. 12) they are consistent with the standard instructions given. As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there is inconsistent with the law. It simply indicates that the jury is entitled to award nominal damages. It doesn't say that there isn't any injury. It simply states that even if there are not compensatory damages [unclear] . . .

THE COURT: It's required under Cury against Pfitez [unclear] . . . reversible error to not to give it, so, you don't have to address yourself to the shotgun technique which has been used here, just the substantive ones. [two voices talking at once]

MS. WAGNER: As I would like to approach that on the pain and suffering, I think that the instruction from the Court again is the standard appropriate one. I think it is for the jury to determine what the future impact is on the plaintiff. I think the evidence is there for punitive, and I object to his statement, all because I think it confuses the jury as it relates to actual injury inferring that there there isn't any injury and I think it could be very

misleading as it – it is – it comes across, because it may infer that it may be a physical injury, and I don't that's the case.

(p. 13) THE COURT: Alright. Many of the arguments offered by the defendant may very well, not many, some may have some further consideration by the Court. The defendant's suggestions are assuming that certain evidence will not be presented. And in the event that does occur, there will be the appropriate excising. The Court, however, does attempt to provide counsel with all of those appropriate instructions which may be provided to a jury dependent upon that proof which may be offered, and accordingly, the Court will reserve on those objections based upon that evidence which is submitted to the jury when we begin.

Is there anything further to come before the Court before we ask the jury to join us? Ms. Wagner?

MS. WAGNER: No, your Honor.

THE COURT: Alright. We will recess for approximately three minutes and we will see if all the jurors are here and if they are, we will begin about two minutes after nine.

## PLAINTIFF'S REQUESTED SPECIAL JURY INSTRUCTIONS – DAMAGES

### COMPENSATORY DAMAGES: VIOLATION OF CONSTITUTIONAL RIGHTS

You, the jury, have already found that the defendant(s) – The City of Madison, Thomas Hischke, Robert Peterson, Jerome Gartner, Robert Birrenkott, John Mulcahy and Paul Anderson – have violated the Constitutional rights of the plaintiff, Sheila Sims. Specifically, you have found: (Court reads violation of specific rights.) Damages for a violation of the plaintiff's constitutional rights fall into two categories: Compensatory and Punitive damages. You should first assess the amount of compensatory damages that would fairly and reasonably compensate the plaintiff for this violation of her rights.

Sheila Sims may recover compensatory damages for lost wages, loss of future earning capacity, mental and emotional distress, community humiliation and loss of professional reputation caused by the infringement of her constitutionally protected rights of free speech and association.

In assessing compensatory damages, you should award the plaintiff only those damages which will reasonably compensate her for the injuries that she sustained as a result of the illegal (entrance into her residence, differential treatment in the manner that discipline was progressed against her, harrassment in her working environment.)

After assessing plaintiff's compensatory damages, you will then be asked to assess what amount of punitive damages, if any, should be awarded against the individual defendant(s).[1]

* * *

5. DAMAGES – LOST WAGES

In arriving at the amount of an award for lost wages, you should include the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff, Sheila Sims, since June 8, 1982, as a result of the differential application of discipline against her. In determining this amount, you should consider any evidence of plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned during the time so lost, had she not been the subject of the differential application of discipline.[2]

6. DAMAGES – MENTAL AND EMOTIONAL DISTRESS

In arriving at the amount(s) of the award(s) for mental and emotional distress, you should include a sum

---

[1] *Knapp v. Whitaker*, 757 F.2d 827, 847 (7th Cir. 1985) (citing *Soldis v. Rio Grande City Independent School District*, 734 F.2d 243, 250-251 (5th Cir., 1984) and *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir., 1983).

[2] §85.04, at 197-198, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977, Substantially Modified).

which will compensate plaintiff reasonably for (1) any pain, suffering and mental anguish already suffered by her and proximately resulting form the injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that she is reasonably certain to suffer in the future from the same cause.

In this connection you may take into account, and you should take into account, plaintiff's interests and past way of life and you may allow for any loss of enjoyment of life for any emotional strain or any mental suffering which you find proximately resulted from the actions of the defendant(s).[3]

## 7. DAMAGES – COMMUNITY HUMILIATION AND LOSS OF REPUTATION

With regard to community humiliation and loss of reputation, the measure of damages is such sum as will compensate the plaintiff for the damage that has resulted from (the illegal entrance into her residence, differential application of discipline, harassment in her working environment).

It is not required that the plaintiff prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. Further, it is not necessary for the plaintiff to prove that she

---

[3] § 85.05, at 115, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977). *Wells v. Colorado College*, 478 F.2d 158, 163 (10th Cir. 1973).

suffered an actual out-of-pocket loss in order to substantiate damage to her reputation and good name.[4]

8. DAMAGES – PUNITIVE

In addition to actual or compensatory damages, the law permits you, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for their conduct, and to serve as an example or warning to others not to engage in such conduct.

If you should find from a preponderance of the evidence in this case that the plaintiff, Sheila Sims, is entitled to a verdict for actual or compensatory damages and should further find that the conduct of the defendant(s) (specify) which proximately caused the damage to Sheila Sims was malicious, wanton or oppressively done; then you may, if in the exercise of your discretion, you unanimously choose to do so, add to the award of actual or compensatory damages such amount as you shall agree will serve to punish defendant(s) and to deter the defendant(s) and others from like conduct.

An act or a failure to act is "maliciously" done if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories to which the injured person is a member.

---

[4] *Crawford v. Garnier*, 719 F.2d 1317, 1324 (1983). Wisconsin Jury Instruction 2516 (as modified).

An act or a failure to act is "wantonly" done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or failure to act is "oppressively" done if done in a manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse of abuse of authority or power, or by taking advantage of some weakness, disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant(s)' acts or omissions, which proximately caused actual damage to the plaintiff, were maliciously or wantonly or oppressively done; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reasons, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.[5]

---

[5] § 85.11, at 120-22, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977); *Smith v. Wade*, ___ U.S. ___, 103 S.Ct. 1625, 75 L.Ed.2d 632, 664, n. 15 (1983); *Crawford v. Garnier*, 719 F.2d 1317 (7th Cir. 1983).

9. DAMAGES: TAXATION

In determining the amount of damages for past income and punitive damages you may include in the award a sum to compensate the plaintiff, Sheila Sims, for state or federal income taxes, since damages received as an award for past income and punitive damages are subject to income taxes.

In determining the amount of damages for humiliation, embarrassment, worry, emotional and mental distress, you must not include in the award, or add to it, any sum to compensate the plaintiff for state or federal income taxes, since damages received as an award for humiliation, embarrassment, worry, emotional and mental distress are not subject to income taxes. You will not, of course, subtract from or exclude from you award of damages, any amount because the plaintiff is not required to pay income taxes.[6]

---

[6] Support: Instruction and evidence as to the impact of income taxes is appropriate in cases determined pursuant to federal substantive law. *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); *In Re Air Crash Disaster Near Chicago, Illinois*, 701 F.2d 1189, 1192 (7th Cir., 1983). Damages which represent compensation for loss of future income, pension and disability benefits, other fringe benefits, and loss of professional reputation, are included as income for federal and state taxes. *Knuckles v. Commissioner*, 349 F.2d 610 (10th Cir. 1965); *W.F. Henry*, 62 Tax Ct. Rep. (C605 (Decision No. 5585-73 (1974)); *W.H. Evans*, 40 Tax Ct. Memo Dec. 260 (Decision No. 2623-78, T.C. Memo 1980-142 (1980)). *V.L. Anderson*, 38 Tax Ct. Memo Dec. 1206 (decision No. 7586-77, T.C. Memo 1979-303 (1979)); *F. Gunderson*, 38 Tax Ct. Memo Dec. 464 (Dec. 7922-77, T.C. Memo 1979-99 (1979)).

(Continued on following page)

---

(Continued from previous page)

Revenue Ruling 84-103, 1984-2 C.B. 32 (punitive damages not excludable from gross income); Revenue Ruling 85-98 I.R.B. 1985-2, 5 (amount received in settlement which is attributable to punitive damages is taxable); damages which are compensation for personal injuries are not taxes. ¶ 104(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 104,(a)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

| | | |
|---|---|---|
| SHEILA SIMS, | ) | |
| | ) | Case No. |
| Plaintiff, | ) | 88 C 524 S |
| vs. | ) | |
| | ) | Filed |
| CITY OF MADISON, | ) | JAN 30 1989 |
| Defendant. | ) | |

CONFERENCE RE: SPECIAL VERDICT AND JURY INSTRUCTIONS CONCERNING DAMAGES, part 2

BEFORE DISTRICT JUDGE JOHN C. SHABAZ

Conference on January 6, 1989

APPEARANCES:

For the Plaintiff: Kathleen Wagner
Wagner Law Offices
222 S. Hamilton, #13
Madison, WI 53703

For the Defendant: Steven J. Schooler, and
Brad Armstrong
Axley Brynelson
PO Box 1767
Madison, WI 53701

Carroll Metzner
Bell, Metzner & Gierhart
PO box 1807
Madison, WI 53701

Karen Little, Transcriber
Words Unlimited

(p. 2) THE COURT: . . . I'm now going to address, and the problem is that it may take a few moments more than 11:30. I am now going to address your attention to the instructions and the special verdict.

First of all, the special verdict will read as follows: One change. Question one. What sum of money will thoroughly and reasonably compensate the plaintiff for any damage caused by. I'm deleting the and I'm singularizing damage – caused by defendant Mulcahy's unconstitutional entry into her apartment. I am accepting the specific rather than the general language. That specific language having brought to our attention by Mr. Schooler in the liability portion of the trial. To be consistent, I would be using that specific language. The rest of the verdict is the same.

I wish to display the Court's surprise as it relates to the damages requirement of actual injury. This was presented to the Court by the same firm that represented someone by the name Morzenti and a case a number of years ago called Morzenti against Iron County. I believe Mr. Schooler was part of that plaintiff's successful case and argued very vociferously against this type of an instruction, but Mr. Schooler – and I've checked my notes, if I can find it, I just thought I'd spend some time on this to indicate the Court's concern with the changes in (p. 3) positions which appear to occur by good counsel in matters of this nature for which there is apparently no basis whatsoever to make those changes in a case of this nature.

The trial in that case, the plaintiff – this was a pretrial – the case was tried on September 12 of 1983 – Now, Mr.

Schooler and Mr. Mitby were the attorney's for the plaintiff against Iron County. The question on that special verdict which was forcefully argued by the plaintiff was what sum of money will compensate plaintiff for any damage approximately caused by the defendants. We then did specifically itemize certain items such as emotional distress. It's the Court's recollection at that time that there was presented to the Court the arguments in Leonard against Argento, 699 Federal Second 874, 1983 decision, and I'd like you to review it at 889 where it talks about Cury against Pfifetz which tells us that for a violation of a constitutional right itself, there may be damage. The was the request that the Court itemize that specific category constitutional damage. The Court declined to do that. The Court doesn't believe that can be done, although there are some Courts that do, and you'll find that reexamination of that.

I'm doing most of this from memory, but the fact is that in those early days, it seemed that everybody had a pretty good idea of what was going on, and every time that (p. 4) I see these changes, I just wonder, you know, what's really happened in this area of the law which changing. I don't find anything which allows the [phonetic] Memphis . . . Sticora Instruction. This case is for compensatory damages only where they may be awarded for actual damage. That isn't the case here.

The case here, as significantly argued by counsel on previous occasions, the very violation of a constitutional right itself is something that this jury may consider. And that's the reason. Ever since that case, the Court does craft the instruction which – the Court believes which very well have been appropriate in that case, you'll also

find that we gave the good faith instruction, when you look at it Mr. Schooler. We had been wrong on that point, but nobody knew it, I guess. But the fact of the matter is – or perhaps that was before they told us in [phonetic] Travels and Bates against Jean that we can't do that – but the fact is that the Court rejects – this is a long way of telling it – rejects your supplemental instruction.

It believes that in this particular instance there is a substantive constitutional violation, and that indeed, a buck, if you will on the vernacular, nominal damages just for that alone can be awarded. And I realize that I'll be stating this perhaps each and every instruction conference (p. 5) with this firm and one or two others for the balance of this Court's career.

Accordingly, that instruction is rejected.

The next item relates to those instructions which were suggested by the plaintiff which the Court finds there is no – there is legal basis for the instruction which is entitled community humiliation and the loss of reputation. None of that has been presented. There is no question that the case which has been cited – I'll also give you another one which is a prior case, Bush against Burke, 648 Federal Second 509 which was cited in [phonetic] Crawford – community humiliation and loss of reputation are properly considered in determining compensatory damages 1983 claims. The Court did provide some attention to that. Believe that and believe that it is not appropriate. Nor is the monetary loss appropriate if there is that attempt to be found as to the loss of rent. There was no attempt to rent the plaintiff's decision was that she would not rent. That was her personal decision. She determined

that to be the best way to proceed. There was no basis whatsoever to indicate that the other bedroom could not have been rented. Nor do I believe there was anything in the record to indicate she had previously received rent from the roommate with whom she had been residing at the time of this action. That, of course, is not relevant to the Court's decision, (p. 6) but there has been no determination that there was an attempt to rent. There has been no determination that someone refused to rent because of the incident.

The instructions, then, will be as submitted except that the Court is of the opinion that – damages compensatory and nominal. I do think that there can be the suggestion as made by the defendant. That damage appears to be – defendant has referred in its instructions. I will place it only in one spot. I will not place it in approximate cause because of the cases which I have previously referred to. I will not place it in that portion which is determine to be the instruction more than approximate one approximate cause, but it does appear to be appropriate in the instruction entitled pain, mental anguish, past and future. The Court believes that that can, and I believe it has been, specified, in arriving in the amount of the award, you should include a sum which will compensate plaintiff reasonably for any pain, suffering, and mental anguish already suffered by her, and approximately resulting from the injury in question.

I would suppose we should change that to the action in question. I think there is a better word than injury. And any pain, suffering, and mental anguish that your find from the evidence in the case which she is reasonably certain to suffer in the future from same cause.

(p. 7) I am at this time denying the defendant's that there should be no futures. There has been that testimony that she continues to have sleepless nights that she continues to feel some anxiety and anguish. I think it's a jury question, and accordingly, the only place that the mental anguish will be referred to as the Court can find will be in that damages instructions so entitled. It's already been there, and then we say [phonetic] Carry against Phifis. In this connection, you may take into account – strike that – that's the damages, pain and mental anguish. I am confusing myself with the damages compensatory and nominal. I believe that's the instruction. What I'm referring to mental anguish, I believe that that's the instruction to which I am referring.

You should determine what sum of money will fully compensate the plaintiff for pain, suffering, and mental anguish that was approximately caused by the defendant's violation of the plaintiff's rights.

I knew there was one instruction I want to change, and that's the one. That's the only evidence which has been before us. I am going to leave the one that I've just read to you as is except perhaps changing resulting from injury in question. Any further question at this time?

MS. WAGNER: No, your Honor.

MR. ARMSTRONG: No, sir.

(p. 8) THE COURT: Do you have a better word for injury in question, Ms. Wagner?

MS. WAGNER: I think action in question is appropriate.

THE COURT: Mr. Armstrong?

MR. ARMSTRONG: That's fine.

THE COURT: I regret to take all of this time, but you folks continue to perplex the Court with shifting winds that are wrought with tension time after time after time. We will be back at 11:30.